As my view of the proclamation is that it is *prima facie* valid, until it is declared otherwise, in the face of that finding the clear duty of the Election Commission can only be to hold an election within the prescribed period. Since it is the clear duty of 3rd to 7th defendants what reason can the Court give for issuing an order preventing the 3rd to 7th defendants from performing their clear constitutional duty? In the public interest or in the interest of justice I exercise my discretion and refuse to issue an injunction against the 3rd to 7th defendants.

If I am still in error the next question will be has the Court the jurisdiction to issue this injunction against the 3rd to 7th defendants? That leads me to consider whether the 3rd to 7th defendants are officers of the government. Miss Mary Lim, counsel for the 3rd to 7th defendants, citing various authorities, contended they are and therefore under section 29(2) of the Government Proceedings Ordinance 1956 no injunction could be given against them as the effect would be giving the plaintiff relief which he could not have obtained against the government. Mr. Sri Ram, counsel for plaintiff, contended they are not also after citing several provisions of the Federal Constitution. Alternatively, even if they are so on the authority of *Tengku Haji Jaafar* v. *Government of the State of Pahang*[1] nonetheless injunction can be granted.

I rule they are officers of government and in my view they cannot be otherwise. The slight confusion occurs because the statute creating that body or department has given them certain privileges and restricts the appointees to a certain category of persons that seems to set them apart from members of the public service. That their funds they utilise be charged on the Consolidated Fund is to give them a certain degree of independence so that their salary would not be subject to the discussion of Parliament unless the Act which created them is properly under discussion. Stripped of all that they are officers in the employ of the Federal Government. The definition of "officer" in the Government Proceedings Ordinance in relation to a government includes a person in the permanent or temporary employment of such government. It cannot be denied that the 3rd to 7th defendants are in the employment of the Federal Government. In my view there cannot be other interpretation as their salaries are paid by the government.

An injunction has been asked for when none can be given. For reasons I have stated above, I exercise my discretion that no injunction can be granted against the 3rd to 7th defendants and I therefore dismiss the plaintiff's application for injunction against 3rd to 7th defendants with costs.

Application dismissed.

Solicitors: *Hj. Mohamed Noor, Dr. Yaacob & Ismail.*

BANK BUMIPUTRA MALAYSIA BHD. v. THE INTERNATIONAL TIN COUNCIL & ANOR.

[O.C.J. (V.C. George J.) January 13, 1987]

[Kuala Lumpur – Civil Suit No. C23-1206-86]

Practice and Procedure – Writ filed in Malaysia – Order for service thereof out of jurisdiction in London on 1st defendant – 1st defendant enjoys immunity from being sued in England – Money claim against 1st defendant – Claim for tin against 2nd defendant – Claim against both defendants for declarations for right to tin – Application by 1st defendant to set aside order granting leave for service outside jurisdiction – R.H.C. 1980, O.11, r. 1 - Courts of Judicature Act, 1964, s. 23.

The plaintiff bank issued a writ against the International Tin Council (ITC) as the 1st defendant and Datuk Keramat Smelting Sdn. Bhd. as the 2nd defendant. ITC is an organization established as a result of agreement arrived at among various countries, one of which is Malaysia. ITC has its headquarters in London and enjoys immunity from being sued in England. The plaintiff bank through its London branch had provided banking facilities to ITC. The plaintiff bank alleged that as at March 10, 1986, there was due and owing to it from ITC the sum of £76,127,721.29 in respect of such facilities. It was also alleged that ITC had provided a continuing security by a pledge upon (i) goods delivered by ITC or its agents to the bank or its agents and (ii) warrants, delivery orders and all documents of title to goods deposited with the plaintiff bank. The plaintiff contended that ITC had deposited with it a number of tin warrants issued by the 2nd defendant on the sale of tin referred to therein; such tin apparently should be in the possession of the 2nd defendant in Penang. The plaintiff bank contended that by virtue of the pledge by ITC, the plaintiff bank was entitled, on the failure to meet the demand of the amount owing, to possession of the tin in respect of which the warrants were issued. Hence, the plaintiff bank claimed, *inter alia*, as against both defendants, declarations to the effect that the plaintiff bank had a right to the tin. The 2nd defendant has delivered a defence.

The plaintiff bank was given leave to serve the writ on ITC outside the jurisdiction in London. ITC entered a conditional appearance and now applies to have the order granting such leave set aside, alternatively for such leave to be restricted by exclusion of the plaintiff bank's claim for £76,127,721.29, interest and damages.

Held: (1) with regard to the claim in respect of the tin, the plaintiff bank is entitled to seek to serve the writ on ITC outside the court's territorial jurisdiction, invoking either (j) or (k) of O.11, rule 1, R.H.C. 1980;

(2) the order of court dated June 27, 1986, and the Notice of Concurrent Writ of Summons to be served out of the jurisdiction on ITC are set aside with costs;

(3) leave to issue a Notice of Concurrent Writ of Summons against ITC is granted provided the Statement of Claim is amended deleting the money claim.

[*Editorial Note:* This application by ITC was heard together with a similar application also by ITC in CS.C.23-1205-86 wherein Malayan Banking Bhd. was the plaintiff. The judgment in this case applied *a fortiori* to the latter.]

Cases referred to:

(1) *Siskina (Cargo Owners)* v. *Distos S.A.* [1979] A.C. 210, 254.
(2) *Re Busfield* (1886) 32 Ch. D. 123.
(3) *Multinational Gas* v. *Multinational Gas Services* [1983] 2 All E.R. 563, 575.
(4) *Massey* v. *Heynes & Co.* (1888) 21 Q.B.D. 330.
(5) *Witted* v. *Galbraith* [1893] 1 Q.B. 577.
(6) *Trendtex Corpn.* v. *Central Bank* [1977] 2 W.L.R. 356, 368.
(7) *Rahimtoola* v. *Nizam of Hyderabad* [1958] A.C. 379, 422.
(8) *Thai-Europe Tapioca Service Ltd.* v. *Government of Pakistan* [1975] 1 W.L.R. 1485, 1491.

SUMMONS-IN-CHAMBERS.

Vinayak Pradhan for the plaintiff/respondent.

J.A. Yeoh for the 1st defendant/applicant.

Ghazi Ishak for the 2nd defendant.

Chin Yew Meng on watching brief for Malaysian Smelting Corporation.

Cur. Adv. Vult.

V.C. George J.: The plaintiff bank had caused to issue in this Court a writ against the International Tin Council as the 1st named defendant with Datuk Keramat Smelting Sdn. Bhd. as the 2nd defendant.

It is alleged in the statement of claim that since 1976 the plaintiff bank had provided banking facilities to the International Tin Council (ITC) which is an organisation established as a result of agreement arrived at between various countries, one of which is Malaysia. The ITC has its headquarters in London and apparently functions from there.

The plaintiff bank has a branch in London and the said banking facilities were said to have been arranged through that branch and executed in London.

It is alleged by the plaintiff that as at March 10, 1986, there was due and owing from the ITC to the Bank in respect of the said facilities the sum of £76,127,721.29 with interest accruing. It is also alleged that the ITC had provided a continuing security for the facilities provided by the Bank by a pledge upon goods delivered by ITC or its agents to the Bank or its agents and upon warrants, delivery orders and all documents of title to goods deposited with the Bank.

The plaintiffs contend that ITC had deposited with them a number of what is referred to as tin warrants which they appear to contend to be documents of title to the tin referred to in each of the warrants. These warrants appear to have been issued by the 2nd defendant on the sale of the tin referred to therein and such tin apparently should be in the possession of the 2nd defendant in Penang. It is the contention of the plaintiff that by virtue of the pledge of those warrants and/or of the tin, to the plaintiffs by ITC, the plaintiffs were entitled on the failure to meet the demand of the amount owing, to possession of the tin in respect of which the warrants were issued.

Demands for the money had been duly made to ITC and were not met. Instructions by the Bank to the 2nd defendant in respect of delivery of the tin in respect of which they were the holders of the tin warrants were not met.

Hence the writ claiming, *inter alia*, as against the 1st defendants the amount said to be owing and damages, as against the 2nd defendant damages for failure to hold the tin for the plaintiffs and as against both defendants declarations to the effect that the plaintiffs have a right to the tin because of the pledge and because of an equitable charge or lien over the tin and/or the tin warrants. Consequential orders are also sought.

The 2nd defendant entered an appearance and has delivered a defence.

The plaintiffs were given leave to serve the writ on the 1st defendant outside the jurisdiction in London. The 1st defendant entered a conditional appearance and now applies to have the order giving the plaintiffs leave to serve the writ on the 1st defendant outside the jurisdiction set aside alternatively for the leave granted to be restricted

by exclusion of the plaintiffs' claim for the £76,127,721.29 interest and damages.

It is a general rule that the jurisdiction of the Courts over persons is territorial. It is restricted to those upon whom its process may be served within the territorial jurisdiction of the Courts. See *Siskina (Cargo Owners)* v. *Distos S.A.*[1]; also see *Re Busfield*[2]. To this general rule there are exceptions, to be found in Order 11 of the Rules of High Court. Order 11 gives the Court the discretionary jurisdiction to allow the process of the Court to be served outside its territorial jurisdiction. For the discretion to be exercised the action must fall within one of the sub-paragraphs of Order 11 rule 1 (or rule 2 which is not relevant in this case).

Encik J.A. Yeoh, counsel for the 1st defendant applicant, contends that the plaintiffs have made two separate and distinguishable claims against it, the first being the money claim and damages and the second being the declarations and related orders sought in respect of the tin held by the 2nd defendant. He submits that the money claim as against the 1st defendant does not fall within any of the sub-paragraphs of Order 11 rule 1.

It is clear that that part of the claim is only against the 1st defendant. It is for the plaintiffs to satisfy the Court that it falls within one of the sub-paragraphs of Order 11 rule 1. The first of two possibilities are sub-paragraphs (f) and (g) which read as follows:-

"(f) if the action begun by the writ is brought against a defendant to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which –

(i) was made within the jurisdiction; or

(ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction; or

(iii) is by its terms, or by implication, governed by the law of Malaysia;

(g) if the action begun by the writ is brought against a defendant in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;"

It is not disputed or seriously disputed that the agreement to provide ITC with the banking facilities and the execution thereof was made and effected in London. Accordingly (f)(i) has no application. No question of agency arises and (f)(ii) accordingly has no application. There has been no suggestion made that the law applicable to the facilities granted is Malaysian law. The contract having been entered into in England unless the parties had agreed to the contrary, English law would apply. Thus f(iii) also has no application. Sub-paragraph (f) has to be ruled out.

As to sub-paragraph (g), since the overdraft facilities were granted by the bank's London Branch to ITC in London the failure to pay the amounts due by ITC could amount to a breach committed in London. In any event the Bank has not shown that the breach was committed within the jurisdiction without doing which (g) is not available to the Bank.

For the Bank it has been contended by Encik Vinayak Pradhan that sub-paragraph (j) has application.

"(j) if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto;"

There can be no doubt that the writ against the 2nd defendant in respect of the claim for the declaration in respect of the tin was properly brought. And I have no doubt that in respect of that claim ITC are necessary and proper parties thereto. In *Multinational Gas* v. *Multinational Gas Services*[3] reference was made to *Massey* v. *Heynes & Co.*[4] where at page 338 Lord Esher M.R. suggested a useful test in respect of the application of sub-paragraph (j).

"The question, whether a person out of the jurisdiction is a 'proper party' to an action against a person who has been served within the jurisdiction, must depend on this, – supposing both parties had been within the jurisdiction would they both have been proper parties to the action? If they would, and only one of them is in this country, then the rule says that the other may be served, just as if he had been within the jurisdiction.

In agreeing Lindley L.J. said at page 338:

"When the liability of several persons depends upon one investigation, I think they are all 'proper parties' to the same action, and, if one of them is a foreigner residing out of the jurisdiction, rule 1 (g) of Order xi applies."

In *Witted* v. *Galbraith*[5] that test suggested by Lord Esher was applied.

It was ITC that provided the security which the 2nd defendant claims they are not obliged to or refuse to honour. If ITC was within the jurisdiction there would have been no question that they would have been made parties and properly so.

Encik Pradhan argues that having properly made ITC parties to the action it was open to the Bank to tag to their claim any and other claims that the bank may have against ITC particularly where the further claim against ITC is related to the claim in which ITC and the 2nd defendant are both involved.

After a careful consideration of the facts made known to me, I have concluded that the money claim against ITC is separate and distinguishable from the claims against the 2nd defendant.

Encik Pradhan had contended that it is section 23 of the Courts of Judicature Act 1964 that gave the Court jurisdiction in a cause or matter and that because of section 23 the distinction sought to be made by Encik Yeoh between the claim against ITC and against the 2nd defendant is not available in Malaysia. I have failed to see any merit in that contention. Section 23 is the statutory provision embodying the general rule referred to earlier in this judgment that the jurisdiction of our Courts is territorial. Order 11 rule 1 in fact widens the jurisdiction of the Courts beyond the confines of section 23(1). None of the sub-paragraphs to section 23(1) are relevant *vis-a-vis* ITC.

I think it amounts to an abuse of the process to have allowed the service of the writ outside the jurisdiction so long as the money claim is tagged on to that part of the plaintiffs' claim properly made against both defendants. Order 11 rules 1 and 2 provide what Lord Diplock described in the *Siskina* at 254H as "exorbitant jurisdiction". What he said of the equipollent English rule bears repeating:

> "These are 'exorbitant' jurisdictions which run counter to the normal rules of comity among civilised nations. For this reason it has long been held that where there is any room for doubt as to their meaning the provisions of the sub-rules are to be strictly contrued in favour of the foreigner: *The Hagett* [1908] P.189, 201 per Farwell L.J. And it is in my view equally well settled now that it is not permissible in any action commenced by service of process on a person out of the jurisdiction to litigate any claim that does not fall within one or other of sub-rules (a) to (o)."

Now, that ITC enjoys immunity from being sued in England and that accordingly if the Malaysian Courts refuse to allow the writ to be served on ITC in London the Bank may be left without a remedy is a fact that is not relevant in deciding whether that part of the action brought against ITC for the money claim falls within the ambit of any of the sub-paragraphs of Order 11 rule 1.

It would have been otherwise if it was necessary for the Bank to obtain a judgment before they are entitled to enforce the securities. But that is not the case for the plaintiffs. The case against the 2nd defendant is that upon demand made on ITC they are entitled to enforce the securities.

Encik Yeoh attempted to use *inter alia* the immunity that ITC enjoys in England to persuade me to allow his application. Shortly stated his contention was that because there was the statutory immunity accorded to ITC from being sued in the English Courts to allow it to be sued here would run foul of international comity or courtesy. I reject that argument. The relevant international agreements as a result of which ITC was established specifically provided for ITC to enjoy certain immunities in the United Kingdom. Provisions were made in respect of the position of ITC in the other member countries and immunity from suit was not one of them. The parties to the agreements appear to have treated the host country (*i.e.* the United Kingdom) in a different way from the other member countries. Immunity from suits in the other member countries does not appear to have been sought or given. In the circumstances I am inclined to what Lord Denning has called the modern rule in *Trendtex Corpn.* v. *Central Bank.*[6] He referred to his own judgments in *Rahimtoola* v. *Nizam of Hyderabad*[7] and *Thai-Europe Tapioca Service Ltd.* v. *Government of Pakistan*[8] and said:

> ". . . . . a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts . . . . . international comity requires that it (*i.e.* the foreign sovereign) should abide by the rules of the market."

Encik Yeoh had contended that sub-paragraph (k) has no relevance. He pointed out that in the letters of pledge the word "charge" is not used. That may be so but it seems to me that there can be no doubt that in fact the bank had provided what in effect was a charge over what they held out to be their tin held by the 2nd defendant in favour of the banks. In my view in respect of the claim in respect of the tin the plaintiff is entitled to seek to

serve the writ on ITC outside the Court's territorial jurisdiction invoking either (j) or (k).

The order of Court dated June 27, 1986, and the Notice of Concurrent Writ of Summons to be served out of the jurisdiction on ITC are set aside with costs.

Leave to issue a Notice of Concurrent Writ of Summons against ITC is granted provided the Statement of Claim is amended deleting the money claim.

Order accordingly.

Solicitors: *Skrine & Co.; Shearn Delamore & Co.; Presgrave & Matthews; Allen & Gledhill.*

SAUL HAMID v. PUBLIC PROSECUTOR

[R.Cr.J. (Edgar Joseph Jr. J.) June 4, 1987]

[Penang – Criminal Revision No. 53-8-87]

Criminal Law and Procedure – Remand proceedings – Right to counsel – Criminal Procedure Code, (F.M.S. Cap. 6), s. 117.

Constitutional Law – Remand proceedings – Right to counsel – Federal Constitution (Malaysia), art. 5(3).

Jurisdiction – "Inferior Criminal Court" – Meaning of – Criminal Procedure Code (F.M.S., Cap. 6), ss. 117 & 323.

The police in the present case wanted to apply for remand of the accused for a further period of time. Counsel for the accused wanted to be present during the remand proceedings to oppose the application for further remand. However, the President of the Sessions Court refused to give him any audience at that stage.

As a result the present proceedings were brought by way of revision to determine the main issues in this case, namely (1) whether a Magistrate or President who authorises or refuses to authorise the detention of an arrested person pursuant to the provisions of section 117 is an "Inferior Criminal Court" within the meaning of section 323 of the Criminal Procedure Code (F.M.S. Cap. 6) ("the Code"); (2) whether an arrested person has the right to be represented by a legal practitioner in remand proceedings under section 117 of the Code.

Held: (1) when a Magistrate or President exercises powers under section 117 he does so as an Inferior Criminal Court within the meaning of section 323 of the Code;

(2) generally an arrested person has a right to be represented by a legal practitioner in remand proceedings before a Magistrate under section 117 unless the police can discharge the onus of satisfying the Magistrate that to allow him to exercise that right would result in undue interference with the course of investigation;

(3) from the record of the proceedings in the Court below, the President had erred; first, in peremptorily excluding counsel merely on the ground that counsel has no right to be heard, and secondly, in not recording his reasons for extending the order for remand as required under the explicit provisions of section 117 (iii) of the Code.

Cases referred to:

(1) *R.* v. *Local Government Board* [1902] 2 Ir. R. 373, 383, 384.
(2) *Chong Fook Kam & Anor.* v. *Shaaban & Ors.* [1968] 2 M.L.J. 50, 52.
(3) *Ooi Ah Phua* v. *Officer in Charge, Criminal Investigation Kedah/Perlis* [1975] 2 M.L.J. 198, 200.
(4) *Hashim Bin Saud* v. *Yahya Bin Hashim & Anor.* [1977] 2 M.L.J. 116.
(5) *Quinn* v. *Leathem* [1901] A.C. 495, 506.
(6) *Balakrishna* v. *Emperor* A.I.R. 1931 Lah. 99.
(7) *In re Llewelyn Evans* A.I.R. 1930 Lah. 95.
(8) *Sunder Singh* v. *Emperor* A.I.R. 1930 Lah 945.
(9) *Ramli bin Salleh* v. *Insp. Yahaya Bin Hashim* [1973] 1 M.L.J. 54, 56.

CRIMINAL REVISION.

Karpal Singh (*V. Sithambaram* and *Asamaley* with him) for the applicant.

Mohammed Bazain bin Idris (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: The short but ever recurring and important point of law which arises in this revision may be stated shortly thus:

Has an arrested person the right to be represented by a legal practitioner in remand proceedings under section 117 of the Criminal Procedure Code ("the Code")?

All references to sections hereinafter appearing are, unless otherwise stated, to the Code.

Before I embark upon a consideration of the question posed, I should, I think, remind myself of the fundamental proposition that the Court should always be jealous to ensure that the exercise of any judicial power falls within the parameters of the provisions of written law or within its inherent jurisdiction. This must be so for it is an unwritten maxim that the judicial animal being ever voracious should be kept to a restricted diet. Accordingly, the very first question I must ask myself (which incidentally was not raised before me) is whether I